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No. 84-262

In the Supreme Court of the United States

October Term, 1984

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

PUEBLO OF SANTA ANA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION OF PUBLIC SERVICE COMPANY OF NEW MEXICO FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE POSITION OF THE PETITIONER

ROBERT H. CLARK
Counsel of Record

CLYDE F. WORTHEN
PAULA Z. HANSON
KELEHER & MCLEOD, P.A.
P.O. Drawer AA
414 Silver Avenue S.W.
Albuquerque, New Mexico 87103
(505) 842-6262

Counsel for *Amicus Curiae*,
Public Service Company of
New Mexico

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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Public Service Company of New Mexico ("PNM") hereby respectfully moves the Court for leave to file the attached brief *amicus curiae* in the above-entitled cause. The consent of the attorney for Petitioner, Mountain States Telephone and Telegraph Company, has been obtained. The consent of the attorney for the Respondent, Pueblo of Santa Ana, was requested but refused.

PNM has a substantial interest in this case, which is more fully set forth in the attached brief in support of the Petitioner's position, because:

1. PNM is engaged in the generation, distribution, purchase and sale of electricity in New Mexico, and utilizes almost 9,000 miles of electric lines in New Mexico;

2. PNM's electric lines necessarily must, and in fact do, cross the lands of numerous New Mexico Indian Pueblos;

3. At least five Pueblos, including the Respondent Pueblo of Santa Ana, granted PNM rights-of-way across their lands during the period from 1928 to 1936. These rights-of-way were approved by the Secretary of the Interior pursuant to § 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636; the interpretation of which is at issue in the instant case;

4. PNM, like the Petitioner, was unaware of any contention that its rights-of-way might be invalid until the district court entered its decision in this cause. Since the entry of that decision, PNM has been sued by the Pueblo of Isleta (United States District Court for the District of New Mexico, No. CIV-82-1535 C) and the United States on behalf of the Pueblos of Isleta, Sandia, San Felipe, Santa Ana and Santo Domingo (United States District Court for the District of New Mexico, No. CIV-82-1483 BB). In both cases, the Plaintiffs assert that the district court's decision in the present case provides a basis for ejectment and for the recovery of trespass damages against PNM. The decision in the captioned-cause may be determinative of the litigation pending against PNM;

5. If the decision below stands, PNM's ability to provide electric service to its customers, including a substantial number of Pueblo residents and businesses, may be significantly impaired in that uninterrupted service is dependent on the utilization of lines crossing Pueblo lands;

6. PNM also operates the municipal water system for the City and County of Santa Fe. As a consequence of these business activities, PNM is a party to a general water rights adjudication suit currently pending in federal court. (*State of New Mexico ex rel. S. E. Reynolds v. Aamodt,* United States District Court, District of New Mexico, No. CIV 6639-M.) In that suit, four New Mexico Pueblos have challenged the validity of the water rights of PNM and more than one thousand other non-Indians who own land within the Pueblo's boundaries. In dicta in the instant case, the Tenth Circuit discussed the date the Indian Non-Intercourse Act first applied to Pueblo lands. While irrelevant to a resolution of the issues here, such a determination is directly relevant to the issues in *Aamodt* and may have a direct impact on the validity of PNM's water rights at issue in *Aamodt;*

7. The issues raised in this cause and discussed in the attached *amicus* brief may have a direct and immediate impact on PNM and its customers; and

8. PNM was previously granted leave to file an *amicus* brief in support of the Petition for Writ of Certiorari based on the same interest as set forth in this motion and the attached brief.

For the reasons set forth herein and in PNM's brief in support of the Petitioner's position, PNM respectfully

requests that its Motion for Leave to file the accompanying *amicus* brief be granted.

Respectfully submitted,

ROBERT H. CLARK
Counsel of Record

CLYDE F. WORTHEN
PAULA Z. HANSON
KELEHER & MCLEOD, P.A.
P.O. Drawer AA
Albuquerque, New Mexico 87103
(505) 842-6262

Counsel for *Amicus Curiae*,
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QUESTIONS PRESENTED

1. Did Congress intend Section 17 of the Pueblo Lands Act of June 7, 1924, to authorize the New Mexico Pueblos, with the approval of the Secretary of the Interior, to voluntarily grant rights-of-way for their own benefit and did the Tenth Circuit therefore err in holding that rights-of-way granted pursuant to Section 17 are void?
2. Did the Tenth Circuit err in refusing to give deference to the construction given Section 17 of the Pueblo Lands Act by the Department of the Interior?

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BRIEF AMICUS CURIAE OF PUBLIC SERVICE COMPANY OF NEW MEXICO

The *amicus curiae,* Public Service Company of New Mexico ("PNM"), respectfully requests that this Court uphold the validity of limited term rights-of-way which have been both consented to by a Pueblo and approved by the Secretary of the Interior pursuant to Section 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636 (hereinafter referred to as the "Act" or the "Pueblo Lands Act") and that the decision of the United States Court of Appeals for the Tenth Circuit be reversed.

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OPINION BELOW AND JURISDICTION

The opinion of the Tenth Circuit and the grounds upon which the jurisdiction of this Court is invoked are described fully in the brief on the merits of Petitioner, Mountain States Telephone and Telegraph Company ("Mountain States"), filed November 23, 1984.

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STATUTES INVOLVED

The following statutes are involved in this case:

Act of June 7, 1924, 43 Stat. 636;

Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. § 177.

The complete text of both these statutes has been set forth in Mountain States' Petition for Certiorari and therefore only the pertinent portions of text are reproduced herein at Appendix B and Appendix C.

INTEREST OF THE AMICUS CURIAE

PNM is a public utility engaged in the generation, distribution, purchase and sale of electricity. PNM provides retail electric service to portions of north-central and southwestern New Mexico, including the cities of Albuquerque, Santa Fe, Las Vegas, Clayton, Bernalillo, Belen, and Deming. PNM also furnishes wholesale electric service to the New Mexico cities of Farmington and Gallup, to the United States Department of Energy at Los Alamos, New Mexico and to other electric companies. PNM utilizes nearly 9,000 miles of electric transmission, distribution and service lines within the State of New Mexico. This system of interconnected lines is designed to provide uninterrupted electric service to PNM's customers in an economical manner. Indeed, PNM has a statutory obligation to provide adequate, efficient and reasonable electric service at just and reasonable rates. N.M. Stat. Ann. §§ 62-8-1 and 62-8-2 (1978).

Eight of New Mexico's nineteen Indian Pueblos are located in PNM's service area and receive retail electric service from PNM.[1] It is virtually impossible for PNM to provide electric service to non-Indians without its lines crossing Pueblo lands. It is in fact impossible for PNM to provide electric service to the Pueblos without crossing their lands.

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[1] *See*, Appendix A, Map of the area between Belen and Santa Fe, New Mexico. The nineteen Pueblos in New Mexico together own almost 2,100,000 acres of land. Of this, Santa Ana owns approximately 62,000 acres and the Pueblos of Santo Domingo, San Felipe, Isleta and Sandia together own approximately 352,000 acres. The Department of the Interior Annual Report (1981).

PNM also operates the municipal water system for the City and County of Santa Fe. As part of the operation of this system, PNM is required to own certain water rights which are dedicated to non-use. Some of these water rights are appurtenant to Pueblo Indian land and all are the subject of a currently pending water rights adjudication suit. *(State of New Mexico ex rel. S. E. Reynolds v. Aamodt,* United States District Court, District of New Mexico, No. CIV 6639 M.)

The decision below, by invalidating rights-of-way obtained under Section 17 of the Act ("Section 17"), threatens not only the ability of PNM to provide efficient and reasonable electric service generally, but also its ability to serve the Pueblos in its service area in compliance with New Mexico law. Additionally, dicta in the Tenth Circuit's opinion regarding the application of the Non-Intercourse Act to the Pueblos prior to 1924, may affect the water rights of PNM at issue in *Aamodt.*[2]

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[2] In *Aamodt,* four Indian Pueblos—San Ildefonso, Tesuque, Nambe and Pojoaque—have challenged the water rights of approximately one thousand non-Indians, including PNM, who own land within Pueblo boundaries. The Pueblos' challenge is based in part on the assertion that the Indian Non-Intercourse Act of 1834 has been applicable to New Mexico Indian Pueblos continuously since 1851. The date the Non-Intercourse Act first applied to Pueblo land may be relevant to the determination of the ownership and priority of the water rights at stake in *Aamodt.* Whether the Act was retroactively applied by *United States v. Candelaria,* 271 U.S. 432 (1926), is an unresolved question. The conveyance here at issue occurred in 1928. The application of the Non-Intercourse Act to Pueblo Indians during the period at issue in *Aamodt* therefore is not presented by the facts of the instant case. Nevertheless, the Tenth Circuit implied in dicta that the Act has applied to Pueblo land since 1851. *Pueblo of Santa Ana v. Mountain States Telephone and Tele-*

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The Pueblo of Isleta and the United States, based upon the district court's decision in the captioned cause, have challenged the validity of five of PNM's rights-of-way in *Pueblo of Isleta v. Albuquerque Gas and Electric Company and Public Service Company of New Mexico,* United States District Court, District of New Mexico, Cause No. CIV-82-1535 C and *United States of America on behalf of the Pueblos of Isleta, Sandia, San Felipe, Santa Ana and Santo Domingo v. Public Service Company of New Mexico,* United States District Court, District of New Mexico, Cause No. CIV-82-1483 BB. The decision in the instant case will affect PNM's interests in these cases. The facts surrounding PNM's acquisition and use of the rights-of-way being challenged in the above-listed lawsuits are important to a complete understanding of PNM's interest in the instant case. Accordingly, they are more fully discussed below.

The Isleta Right-of-Way

In 1936, PNM acquired a fifty year right-of-way across the Pueblo of Isleta ("Isleta"); the right-of-way was for a term of 50 years, was twenty feet in width and approximately eight and one-half miles in length. (Portions of this grant were renewed in 1962 and 1976 as a result of line relocations under right-of-way acts other than the Pueblo Lands Act.) There has been no allegation that

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graph Co., 734 F.2d 1402, 1404-05 (10th Cir. 1984). A determination as to the date the Non-Intercourse Act first applied to Pueblo land may have a direct impact on the rights of the defendants in *Aamodt* who are not presently before Court. Such a determination need not and should not be made in the instant case.

the existence of this right-of-way has impaired Isleta's land value or precluded other uses of the land.

The 46 kV line constructed within this right-of-way connects a power station near Albuquerque to one near Belen, New Mexico. The line carries electricity to the residents and businesses of Isleta and to the communities of Los Lunas and Belen which lie to the south of Isleta. If PNM cannot utilize the right-of-way, it will not be able to provide efficient, reasonable and uninterrupted service to Isleta. Service to Los Lunas and Belen would also be jeopardized. In emergency situations, these communities and the Isleta could experience prolonged outages.

Present regulations of the Department of the Interior require the consent of the Indian tribe (which includes Pueblos in New Mexico) and the approval of the Secretary of the Interior or his authorized representative before any right-of-way across tribal lands can be granted or renewed. *See,* 25 C.F.R. §§ 169.3(a) and 169.19 (1984). If the district court finds PNM's right-of-way across Isleta invalid, PNM may not be able to maintain its electric line in its existing location on Isleta lands. Yet PNM would remain obligated to provide adequate and efficient electric service at just and reasonable rates to Isleta. PNM could also be put in the position of incurring the needless expenses associated with removing and then replacing its existing line.[3] Isleta may have to bear part of this cost because the right-of-way exists in part to provide it with electric service.

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[3] Current costs of removing such electric lines average approximately $10,000 per mile and costs of constructing electric lines, exclusive of the costs of obtaining rights-of-way, average approximately $105,000 per mile.

The Isleta right-of-way was acquired by Albuquerque Gas and Electric Company ("AG&E"), the corporate name by which PNM was then known. By resolution dated June 29, 1936, the Governor and Lieutenant Governor and six other members of the Pueblo, presumably the Pueblo Council, consented to the grant, subject to the approval of the Secretary of the Interior as required by Section 17. The Superintendent of the United Pueblos of New Mexico then approved the grant and recommended its approval to the Secretary of the Interior. The Secretary, acting pursuant to Section 17, approved the grant in October 1936.

AG&E compensated Isleta for the right-of-way. Isleta obtained an additional benefit because the line constructed within the right-of-way brought electric power to Isleta's residents and businesses. (Interestingly, if the Tenth Circuit's construction of Section 17 is correct, the Pueblos would have been unable to obtain electric service in 1936 because no mechanism would have existed by which they could have conveyed rights-of-way for electric lines.)

PNM openly utilized the right-of-way for more than four decades before its validity was questioned. In 1982, Isleta filed suit, in response to the district court's decision in the captioned cause. After nearly fifty years of the right-of-way's existence, Isleta asserts that the agreement of the Governor and the Lieutenant Governor of the Pueblo and the Pueblo Council to convey the right-of-way, and the approvals of the United Pueblos' Superintendent and the Secretary of the Interior were not sufficient to convey the right-of-way. Isleta claims that a separate act of Congress, apart from the Pueblo Lands Act, was necessary before Isleta could voluntarily convey a limited term right-of-way necessary to obtain electric service.

The Sandia, Santa Ana, Santo Domingo and San Felipe Rights-of-Way

Between 1926 and 1928, PNM acquired rights-of-way for a subtransmission line between Albuquerque and Santa Fe, New Mexico from the Pueblos of Sandia, Santa Ana, Santo Domingo and San Felipe. Each right-of-way was twenty feet wide and was obtained pursuant to Section 17 for a fifty year term. Each was renewed under later right-of-way acts when its term expired.

Originally, the line constructed on these rights-of-way served two purposes—(i) to transmit electricity to the City of Santa Fe and (ii) to distribute electricity to the Pueblos whose lands it crossed. (Significantly, the power line constructed on the rights-of-way passes through the centers of the Pueblos to facilitate service to them. Compare the 115 kV transmission line built in 1958 from Albuquerque to Santa Fe, which follows a more direct route to Santa Fe. App. 1.) Presently, the line is used primarily to distribute electricity to the Indian residents and businesses of the Pueblos and to a small number of non-Indian residents and businesses located near the Pueblos; in fact, PNM has no other means of supplying them electricity.

In acquiring these rights-of-way, AG&E first obtained the consent of the Pueblos of Sandia, Santa Ana, San Felipe and Santo Domingo. As with the Isleta right-of-way, the Pueblo Governors and Lieutenant Governors and members of the Pueblo consented to the grants. The Supervisor of the Southern Pueblos Agency also approved the

grants.[4] Finally, the Secretary of the Interior approved the grants. The Pueblos were compensated for the rights-of-way and further benefitted from their existence in that their businesses and residents have been provided with electric service from the line constructed thereon. The Pueblos have not alleged that these rights-of-way impair the value of their land or are inconsistent with other uses of the land.

PNM utilized these rights-of-way for decades without any question as to their validity. In 1982, the United States filed suit on behalf of the Pueblos seeking trespass damages and PNM's ejectment from these rights-of-way. In this suit, as in the Isleta suit, the plaintiff asserts that PNM is in trespass for utilizing rights-of-way that exist primarily to provide the Pueblos with electricity solely because these rights-of-way were obtained pursuant to Section 17.

As previously discussed, New Mexico law requires PNM to provide adequate, efficient and reasonable service at just and reasonable rates. Furthermore, PNM may not lawfully refuse electric service to persons in its service area who request service. N.M. Stat. Ann. § 30-13-2 (1978). PNM's statutory duties and the decision below place PNM in a curious position vis-a-vis the Pueblos. The Tenth Circuit's invalidation of the Section 17 rights-of-way threatens to make PNM a trespasser for providing electric service to the very people who have requested service but who are now complaining about PNM's right-of-way. PNM may

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[4] The Pueblos of Isleta, Sandia, San Felipe, Santa Ana, and Santo Domingo, as well as Acoma, Cochiti, Jemez, Laguna, and Zia are under the jurisdiction of the Southern Pueblos Agency.

be ejected from its rights-of-way yet remain obligated to provide the Pueblos adequate and efficient electric service at just and reasonable rates to those responsible for its ejectment. Because of these circumstances, PNM might be forced to incur the needless expenses of removing its lines from the contested rights-of-way and then obtaining additional rights-of-way and replacing these lines so as to provide the Pueblos service. Congress could not have intended such a result.

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SUMMARY OF ARGUMENT

The Tenth Circuit's decision incorrectly construes Section 17 to invalidate voluntary Pueblo conveyances approved by the Secretary of the Interior. This Court, rather than invalidating Section 17 conveyances, should find that Section 17 the Pueblo Lands Act authorized voluntary Pueblo conveyances made with Secretarial approval. The fact that Congress intended such a result is evident from the history of the enactment of Section 17, the language of Section 17 itself, and subsequent legislation. The Department of the Interior's contemporaneous and continuous construction of Section 17 provides further evidence that Section 17 authorized voluntary Pueblo conveyances. The Tenth Circuit ignored established rules of statutory construction in failing to give proper deference to the Department's construction.

PNM will not reiterate in detail the arguments of the Petitioner. PNM, with the Petitioner's consent, joins in and supports its arguments relating to the construction and interpretation of Section 17.

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ARGUMENT

I. Congress Intended Section 17 to Empower the Pueblos to Voluntarily Grant Rights-of-Way with Secretarial Approval; Therefore, the Tenth Circuit Erred in Holding that the Conveyance at Issue is Void.

Section 17 empowered the Pueblos of New Mexico to voluntarily convey right-of-way interests in their lands, subject to the approval of the Secretary of the Interior. The conditions the Act sought to remedy, subsequent legislation and the consistent application of Section 17 to validate voluntary Pueblo conveyances demonstrate that this was the intent of Congress in enacting the Pueblo Lands Act.

A. The Conditions the Act Sought to Remedy

Passage of the Pueblo Lands Act was prompted by uncertainty as to the legal status of the New Mexico Pueblos. The unique character and life-style of the Pueblo Indians caused them to be viewed differently from other Indian groups in the United States and their legal status was sharply distinguished from that of most tribes. *See generally, Felix Cohen's Handbook of Federal Indian Law,* 92-96 (1982 ed.). Consequently, it was generally assumed that Pueblo Indians were subject to the laws of New Mexico and the propriety of subjecting Pueblo Indians to state law was upheld in *United States v. Joseph,* 94 U.S. 614 (1877). In *Joseph,* this Court held that the Pueblos were not subject to the federal protective laws, as were other Indian groups, because they were "too civilized". As a result, for over sixty years the Territorial and State courts of New Mexico applied New Mexico law to the Pueblo lands. Dur-

ing this period, non-Indians acquired interests in Pueblo lands through state law condemnations, executions on judgments, tax sales, adverse possession and similar proceedings. *See,* Hearings on S. 3865 and S. 4223 Before Subcommittee of the Committee on Public Lands and Surveys, U.S. Senate, 67 Congress, 4th Session 230-35 (1923).

In 1913, this Court held that the New Mexico Enabling Act of June 20, 1910, 36 Stat. 557, was constitutional in permitting Pueblo land to be treated as Indian country within the meaning of federal legislation prohibiting the introduction of intoxicating liquor on Indian land. *United States v. Sandoval,* 321 U.S. 28 (1913). Subsequently, this Court specifically held that the federal statutes restricting alienation did apply to the Pueblos. *United States v. Candelaria,* 271 U.S. 43 (1926). The *Sandoval* decision created doubt about the validity of interests acquired in Pueblo lands by non-Indians after the decision in *Joseph.* Congress was finally compelled to settle the confusion which resulted from these decisions.

B. The Pueblo Lands Act

Congress passed the Pueblo Lands Act to resolve the confusion regarding Pueblo status. The Pueblo Lands Act addressed three concerns — (i) resolution of the confusion surrounding title to Pueblo lands, (ii) prevention of a recurrence of the same problems, and (iii) extension of the federal protections to the Pueblos. The Pueblo Lands Board was created to resolve questions as to interests previously obtained in Pueblo land. The Act's remaining concerns were addressed in Section 17.

Section 17 was to prevent the then-existing conditions from recurring. The first clause of that Section contains this preventive measure. That clause provides:

> No right, title or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico. . . .

Thus, interests in Pueblo land could no longer be acquired through the operation of New Mexico law. Section 17, therefore, prevented involuntary alienations of Pueblo land previously occasioned by application of New Mexico law.

The third concern of the Act, that the federal protections provided for in the Indian Non-Intercourse Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. § 177, be extended to the Pueblos, was addressed by the second clause of Section 17. That clause provides:

> . . . no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

This portion of Section 17 is very similar in structure and wording to the Non-Intercourse Act.[5] A full comparison is made in the Petitioner's brief on the merits and will not be repeated here. Suffice it to say that, like the Non-

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[5] Compare the language of the Non-Intercourse Act which provides in pertinent part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

Intercourse Act, Section 17 requires approval of Indian conveyances by the United States. Rather than requiring a treaty or convention, however, Section 17 provides for the United States' approval by the actions of its agent, the Secretary of the Interior. This approval, like that provided for in the Non-Intercourse Act, protects Pueblo lands from unwarranted intrusion or impairment by non-Indian interests and fulfills the federal government's responsibility as the guardian of the Indian peoples. Pueblo title was further protected because Pueblo lands would not be subject to *involuntary* alienation until Congress enacted specific legislation so providing.

There is no legislative history specifically relating to the enactment of Section 17. However, the Pueblo of Santa Ana, in its Brief in Opposition to Certiorari, directed this Court's attention to a letter which provides some elucidation of the meaning and purpose of Section 17.[6] The letter is from Francis Wilson to the Indian Affairs Commissioner, Charles Burke. (App. 8.) Mr. Wilson was the Pueblo representative during the legislative hearings on the Pueblo Lands Act and apparently drafted Section 17. This letter directly supports the construction of Section 17 urged by Mountain States and PNM.

In his letter to Commissioner Burke, Wilson stated:

> . . . I would like to call your attention to the fact that Section 17 of the Bill is, we think, the shortest way to prevent present conditions from recurring or existing again. Please look that section over and see if you

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[6] The Pueblo cited this letter as General Services Files 45918-1921-013, pt. 8. See Resp. Br. at 13, n. 5. This letter is fully reproduced herein at Appendix D.

> do not agree with us on that point. This section is intended to cover the same ground as Section 2116 of the Revised Statutes [the Indian Non-Intercourse Act] but it is changed so as to accord with the conditions of the Pueblo Indians. . . . [Omitted discussion of Sections 18 and 19.] Those three sections are therefore not new but have precedent in the Revised Statutes mentioned applicable to other Indians, the last one mentioned putting into effect a criminal code. . . . As to the rest of the new provisions, they are for the most part for the purpose of making . . . a body capable of finding facts upon which future action can be taken whether by Congress or *by the Secretary of the Interior*. [Emphasis added.]

The change in Section 17, "so as to accord with the conditions of the Pueblo Indians," was the allowance of voluntary Pueblo conveyances with Secretarial approval. When the Pueblo Lands Act was passed, Congress understood that the Pueblos had the power to convey their land with Secretarial approval. *See,* 1923 Senate Hearings 72-73, 154-155, 229: 1923 House Hearings, 40-41. *See also, United States v. Candelaria, supra.* The Act allowed the Pueblos to continue to exercise this right of alienation. This statutory conveying mechanism was not novel. At the time of the passage of the Pueblo Lands Act, several existing statutes already empowered the Secretary of Interior to grant rights-of-way across Indian Lands. *See, e.g.,* Act of March 3, 1901, 31 Stat. 1083, 25 U.S.C. § 319 and Act of March 2, 1899, 30 Stat. 992, 25 U.S.C. § 315.

Mr. Wilson's letter, the circumstances surrounding the Act's passage and the post-*Sandoval* practice of allowing voluntary Pueblo conveyances with Secretarial approval make it clear that Congress enacted Section 17 to prevent further *involuntary* losses of Pueblo lands and to

require the United States' approval of Pueblo conveyances via approval of the Secretary of the Interior. The foregoing also demonstrate that an additional act of Congress was not required to empower the Secretary to validate voluntary Pueblo conveyances.

C. Subsequent Legislation

Statutes enacted in 1926 and 1928 provide further evidence that Section 17 did not require a subsequent act of Congress to validate voluntary conveyances approved by the Secretary, but did require a subsequent act to validate *involuntary* conveyances. In 1926, Congress passed the Act of May 10, 1926, 44 Stat. 498, which allowed non-Indians to condemn Pueblo lands for any public purpose. The Act was the direct result of the Jemez Pueblo's refusal to grant the Santa Fe and Northwestern Railway Company (the "Railway") a right-of-way across its land. The Railway, which provided rail service and employment for the Pueblo's members, had extended its tracks in reliance on the Act of 1899, referred to above. The Pueblo Lands Board determined that this Act did not apply to the Pueblo's communal fee interest and that the Railway had not obtained a valid right-of-way. *See,* House Report No. 94-800 to Committee on Interior and Insular Affairs regarding S. 217 (1976).

Representatives of the Pueblos, the Department of the Interior and the Railway met to resolve the problem. Those present at the meeting agreed that a reasonable construction of Section 17 would allow the Railway to obtain a valid right-of-way if the Pueblo would execute an easement deed which the Secretary then approved. *Id.*

and App. 10.[7] However, the Pueblo refused to execute a deed. Congress therefore intervened and enacted this statute which authorized a conveyance of the right-of-way without the Pueblo's consent.

In 1928, when it appeared that the 1926 Act might be legally insufficient,[8] Congress enacted further legislation to clarify that the Pueblos were subject to involuntary alienation of their lands for public purposes. Act of April 21, 1928, 45 Stat. 442, 25 U.S.C. § 322 (1982). This Act extended the right-of-way Acts then in effect to the Pueblos. The so-extended Acts authorized the Secretary to grant rights-of-way for specific purposes without the consent of the Pueblos.

It is not reasonable to suppose that Congress would have empowered the Secretary of the Interior, without the Pueblos' consent, to grant rights-of-way across Pueblo lands yet would have provided no mechanism to validate voluntary Pueblo conveyances. A reasonable construction of Section 17, in the context of subsequent congressional acts, is that it authorized the Secretary to validate voluntary conveyances of rights-of-way by the Pueblos.

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[7] This information comes from a letter included as an Appendix to the Pueblo's Brief in Opposition to Certiorari, and is fully reproduced herein at Appendix E. The Pueblo cited this letter as being in the National Archives, RCC. Sep. 60, File 210663, Sub. 3. See Resp. Br. at 10, n.3.

[8] A New Mexico court had held that the 1926 Act was insufficient because it did not provide a means for joining the United States as a party. See the discussion in *Plains Electric Generation and Transmission Cooperative, Inc. v. Pueblo of Laguna and United States*, 542 F.2d 1375 (10th Cir. 1976).

D. Section 17 Was Consistently Utilized to Validate Voluntary Conveyances

The Pueblos and the Secretary did not believe Congress had arbitrarily refused to authorize their voluntary right-of-way grants. Even after enactment of the 1926 and 1928 Acts, Section 17, rather than either of those Acts, was relied upon when a Pueblo consented to a conveyance. As discussed in the Petitioner's brief on the merits, at least sixty rights-of-way were granted pursuant to Section 17, over a period of thirty years. The last two such grants occurred in the late 1950s.

PNM's rights-of-way exemplify the use of Section 17 to validate a Pueblo's voluntary conveyances. In 1928 and in 1936, PNM could have utilized the 1926 Act, as the Act was utilized on at least twelve occasions, to condemn its rights-of-way. Instead, PNM obtained the Pueblos' consent and the Secretary's approval. Further supportive of the Petitioner's position, is the fact that in 1926 Francis Wilson, the drafter of Section 17 as the Pueblos' representative, urged the Secretary to approve whatever action the Sandia Pueblo took with regard to the PNM right-of-way.[9] In his letter to the Secretary, Mr. Wilson indicated his belief that Section 17 authorized consensual grants, when coupled with Secretarial approval. (App. 16.)

E. Summary

The foregoing demonstrates that Congress intended Section 17 to authorize voluntary Pueblo conveyances

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[9] This information is contained in a letter from Mr. Wilson to the Secretary of the Interior, dated February 27, 1926, which was attached to the Complaint in *United States v. Public Service Company of New Mexico*, U.S. Dist. Ct. D.N.M., No. CIV-82-1483-BB. It is fully reproduced herein at Appendix F.

which were approved by the Secretary of the Interior. Section 17's application, by both the Pueblos and the Secretary, to authorize voluntary Pueblo grants, supports this conclusion. The Tenth Circuit's determination that Section 17 unambiguously required another act of Congress to authorize Pueblo conveyances is not supported by the language of the Pueblo Lands Act, its history or application.

Furthermore, the Tenth Circuit failed to apprehend the implications of its own determination. First, there could have been no voluntarily granted rights-of-way across Pueblo lands until the passage of the Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. §§ 323-328, twenty-five years after the passage of the Pueblo Lands Act. Second, the Department of the Interior, whose responsibility it is to execute Congress' laws, would have violated Congress' plain intent for three decades. Third, the Pueblos, whose representative helped formulate the statute and apparently drafted Section 17, ignored a law which had been enacted for their benefit. Fourth, scores of grantees followed specific Section 17 procedures, when other means existed to obtain valid rights-of-way, despite the fact that Section 17 clearly provided no authority to convey interests in land.

Additionally, affirmance of the Tenth Circuit may have significant present-day consequences. To affirm the Tenth Circuit's decision would constitute a repudiation of mutually agreed-upon and officially sanctioned contracts. Such a result would disrupt relationships between the Pueblo Indians and the non-Indians with whom they conduct business. It could discourage such relationships and broadly undermine Indian business interests.

II. The Tenth Circuit Erred in Failing to Give Proper Deference to The Department of the Interior's Contemporaneous Construction of Section 17.

The Tenth Circuit determined that the thirty-year practice of the Department of the Interior, to authorize over sixty voluntary Pueblo conveyances, was contrary to law. The Tenth Circuit rejected the Department's construction of Section 17 stating:

> [C]ourts are the final authorities on statutory construction and are not obliged to accept an administrative construction which they deem inconsistent with a statutory mandate. . . .

The Department's practice, said the Tenth Circuit, "violate[d] the plain congressional intent of § 17" which required an additional Act of Congress before Pueblos could convey any interest in their land. Congressional intent was plain, the court held, primarily because "[t]he two clauses of § 17 . . . are joined by the conjunctive 'and'." This "and" makes it clear that Congress had not authorized Pueblos to alienate their land and would not provide such authorization until it enacted further legislation. This determination, in light of established principles of statutory construction, is erroneous.

In characterizing Section 17, the Tenth Circuit failed to apply established principles of statutory construction, which recognize that:

> [A] longstanding, uniform construction by the agency charged with the administration of the [Act], particularly when it involves a contemporaneous construction of the Act by the officials charged with the responsibility of setting its machinery in motion, is entitled to great respect.

Chemehuevi Tribe of Indians v. F.P.C., 420 U.S. 395, 410-411 (1975). This respect is even greater when Congress acquiesces in the administrative interpretation when specifically presented with an opportunity to express its dissatisfaction. *See, Saxbe v. Bustos*, 419 U.S. 65 (1974); *Chemehuevi Tribe of Indians v. F.P.C., supra.* In 1926 and again in 1928, Congress was squarely confronted with the issue of the Pueblos' authority to convey interests in their land when it passed the Acts of May 10, 1926, and April 21, 1928. Congress did not express any dissatisfaction with the administrative practice then in effect of validating voluntary Pueblo conveyances.

The deference due to an administrative interpretation is "enhanced by the fact that Congress gave no indication of its dissatisfaction of the agency's scope of . . . its jurisdiction when it amended the Act." *Alabama Ass'n. of Insurance Agents v. Bd. of Governors of the Federal Reserve System*, 533 F.2d 224, 239 (8th Cir. 1976). Congress amended the Pueblo Lands Act in 1933. Act of May 31, 1933, 48 Stat. 108. At that time, Congress did not disturb the administrative practice then in effect for over six years. Accordingly, it may be assumed from Congress' silence that it consented to the practice. *United States v. Jackson*, 280 U.S. 183, 196-197 (1929) and *United States v. Midwest Oil Company*, 236 U.S. 459, 481 (1915). Here, the Tenth Circuit wholly disregarded these principles in its superficial examination of the language of Section 17.

Additionally, it is an established principle that agency officials charged with the responsibility of implementing a statute are held to have a better view of the statute's commands than a reviewing court has many years later. *Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 408 (1961); *see also, United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982). Here, the Tenth Circuit ignored this principle when it substituted its construction, almost sixty years after the passage of the Act, for the contemporaneous construction of the Department.

The Department's[10] construction of Section 17 was reasonable and, in view of the above-discussed principles, should not have been invalidated by the Court of Appeals. *Udall v. Tallman*, 380 U.S. 1, 4 (1965). Accordingly, this Court should reverse the Tenth Circuit's decision, restore the agency's interpretation and find that the conveyance at issue is valid.

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CONCLUSION

For the reasons stated herein, and in the brief of Mountain States, the decision of the Tenth Circuit should be reversed and the case should be remanded with directions to enter summary judgment for the Petitioner because Section 17 of the Pueblo Lands Act empowered the

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[10] PNM expects that the Pueblo of Santa Ana will argue that the Department's construction is not entitled to deference because it was first conceived by a Chicago lawyer attempting to solve the Santa Fe and Northwestern Railway Company's right-of-way problems. Who initially suggested that Section 17 authorized voluntary Pueblo conveyances appears to be unclear. What is clear, however, is that for thirty years the Department utilized Section 17 in this manner.

Pueblo to convey rights-of-way with the approval of the Secretary of the Interior.

Respectfully submitted,

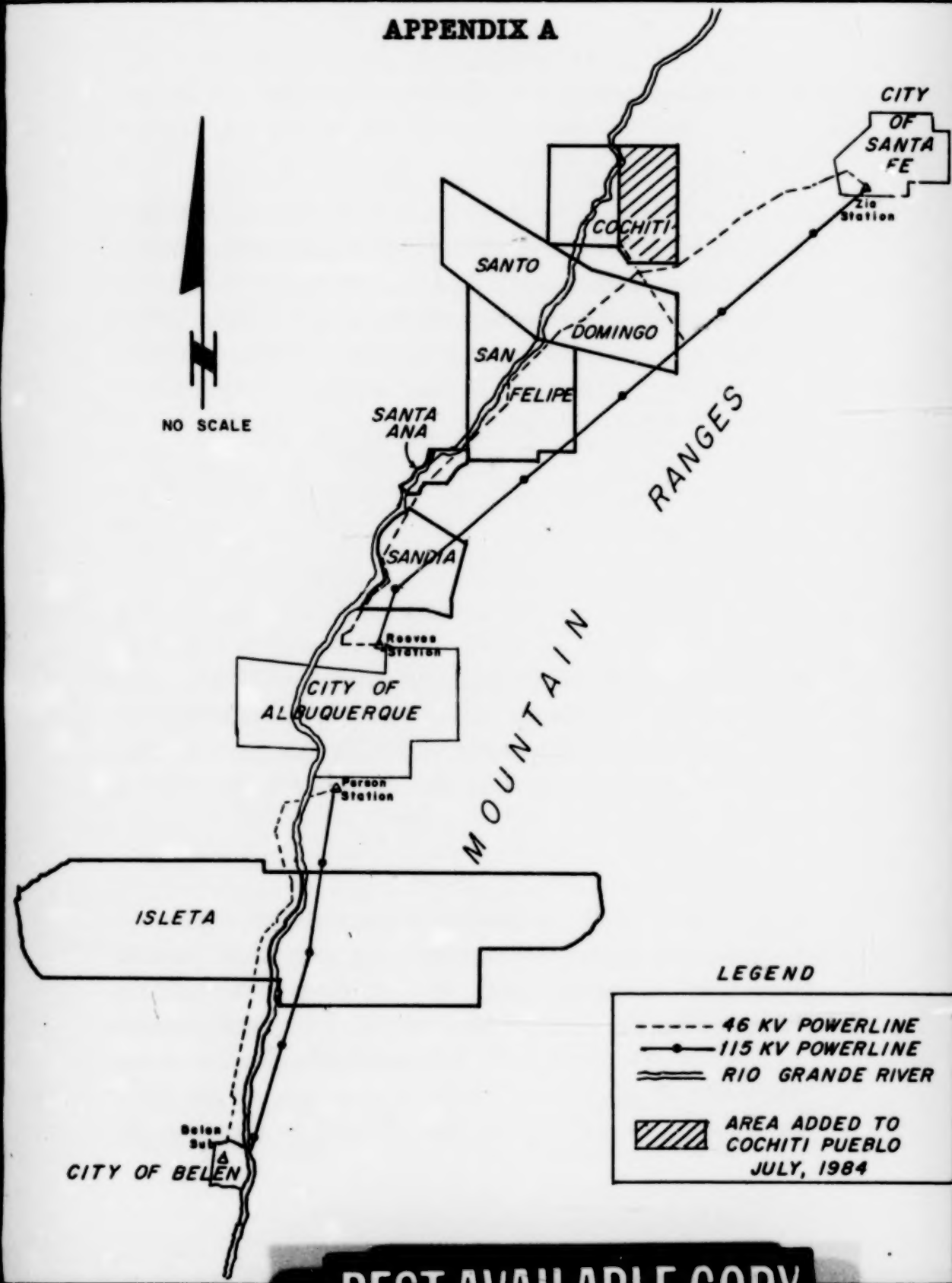
ROBERT H. CLARK
Counsel of Record

CLYDE F. WORTHEN
PAULA Z. HANSON
KELEHER & MCLEOD, P.A.
P.O. Drawer AA
Albuquerque, New Mexico 87103
(505) 842-6262

Counsel for *Amicus Curiae*,
Public Service Company of
New Mexico

APPENDICES

APPENDIX A



APPENDIX B

Pueblo Land Act of June 7, 1924, Act of June 7, 1924, c. 331, 43 Stat. 636, as amended by Act of May 31, 1933, c. 45, § 7, 48 Stat. 108, provides:

"1. That in order to quiet title to various lots, parcels, and tracts of land in the State of New Mexico for which claim shall be made by or on behalf of the Pueblo Indians of said State as hereinafter provided, the United States of America, in its soverign capacity as guardian of said Pueblo Indians shall, by its Attorney General, file in the District Court of the United States for the District of New Mexico, its bill or bills of complaint with a prayer for discovery of the nature of any claim or claims of any kind whatsoever adverse to the claim of said Pueblo Indians, as hereinafter determined.

"2. That there shall be, and hereby is, established a board to be known as 'Pueblo Lands Board' to consist of the Secretary of the Interior, the Attorney General, each of whom may act through an assistant in all hearings, investigations, and deliberations in New Mexico, and a third member to be appointed by the President of the United States.

• • •

"It shall be the duty of said board to investigate, determine, and report and set forth by metes and bounds, illustrated where necessary by field notes and plats, the lands within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico by any authority of the United States of America, or any prior sovereignty, or acquired by said Indians as a community

by purchase or otherwise, title to which the said board shall find not to have been extinguished in accordance with the provisions of this Act . . . .

"3. That upon the filing of each report by the said board, the Attorney General shall forthwith cause to be filed in the United States District Court for the District of New Mexico, as provided in section 1 of this Act, a suit to quiet title to the lands described in said report as Indian lands the Indian title to which is determined by said report not to have been extinguished.

"4. That all persons claiming title to, or ownership of, any lands involved in any such suit, or suits, may in addition to any other legal or equitable defenses which they may have or have had under the laws of the Territory and State of New Mexico, plead limitation of action . . .

• • •

"13. That as to all lands within the exterior boundaries of any lands granted or confirmed to the Pueblo Indians of New Mexico, by any authority of the United States of America or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise and which have not been claimed for said Indians by court proceedings then pending or the findings and report of the board as herein provided, the Secretary of the Interior at any time after two years after the filing of said reports of the board shall file field notes and plat for each pueblo in the office of the surveyor general of New Mexico at Santa Fe, New Mexico . . . .

"14. That if any non-Indian party to any such suit shall assert against the Indian title a claim based upon a

Spanish or Mexican grant, and if the court should finally find that such claim by the non-Indian is superior to that of the Indian claim, no final decree or judgment of ouster of the said Indians shall be entered or writ of possession or assistance shall be allowed against said Indians, or any of them, or against the United States of America acting in their behalf. In such case the court shall ascertain the area and value of the land thus held by any non-Indian claimant under such superior title, excluding therefrom the area and value of lots or parcels of land the title to which has been found to be in other persons under the provisions of this Act: Provided, however, That any findings by the court under the provisions of this section may be reviewed on appeal or writ of error at the instance of any party aggrieved thereby, in the same manner, to the same extent, and with like effect as if such findings were a final judgment or decree. When such findings adverse to the Indian claim has become final, the Secretary of the Interior shall report to Congress the facts, including the area and value of the land so adjudged against the Indian claim, with his recommendations in the premises.

"15. That when any claimant, other than the United States for said Indians not covered by the report provided for in section 7 of this Act, fails to sustain his claim to any parcel of land within any Pueblo Indian grant, purchase, or donation under the provisions of this Act, but has held and occupied any such parcel in good faith, claiming the same as his own, and the same has been improved, the value of the improvements upon the said parcel of land shall be found by the court and reported by the Secretary of the Interior to Congress, with his recommendations in the premises.

"16. That if the Secretary of the Interior deems it to be for the best interest of the Indians that any land adjudged by the court or said Lands Board against any claimant be sold, he may, with the consent of the governing authorities of the pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash; and if the buyer thereof be other than the losing claimant, the purchase price shall be used in paying such losing claimants the adjudicated value of the improvements aforesaid, if found under the provisions of section 15 hereof, and the balance thereof, if any, shall be paid over to the proper officer, or officers, of the Indian community, but if the buyer be the losing claimant, and the value of his improvements has been adjudicated as aforesaid, such buyer shall be entitled to have credit upon his bid for the value of such improvements so adjudicated.

"17. No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

"18. That the pleading, practice, procedure, and rules of evidence shall be the same in all causes arising under this Act as in other civil causes in the Federal courts, except as otherwise herein provided.

"19. That all sums of money which may hereafter be appropriated by the Congress of the United States for the purpose of paying in whole or in part any liability found or decreed under this Act from the United States to any Pueblo or to any of the Indians of any Pueblo, shall be paid over to the Bureau of Indian Affairs, which Bureau, under the direction of the Secretary of the Interior, shall use such moneys at such times and in such amounts as may seem wise and proper for the purpose of the purchase of lands and water rights to replace those which have been lost to said Pueblo or to said Indians, or for purchase or construction of reservoirs, irrigation works, or the making of other permanent improvements upon, or for the benefit of lands held by said pueblo or said Indians."

APPENDIX C

Act of June 30, 1834, c. 161, Section 12, 4 Stat. 730, 25 U.S.C. § 177, provides:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

APPENDIX D

WILSON AND PERRY
Attorneys at Law
Salmon Building
Santa Fe, N.M.

December 18, 1923.

Hon. Chas. H. Burke,
Commissioner of Indian Affairs,
Washington, D. C.

Dear Mr. Commissioner:

Referring to your letter of the 12th inst., I would like to call your attention to the fact that Section 17 of the Bill is, we think the shortest way to prevent present conditions from recurring or existing again. Please look that section over and see if you do not agree with us upon that point. This section is intended to cover the same ground as Section 2116 of the Revised Statutes but it is changed so as to accord with the conditions of the Pueblo Indians.

Section 18 of the proposed legislation covers the same ground as Section 2118 and Section 2117 of the Revised Statutes except that the penalties in each instance have been doubled.

Section 19 is intended to cover the same ground as Section 2145 of the Revised Statutes excluding certain provisions applicable to Indian country which would not be appropriate for the government of Pueblo land grants by your office.

These three sections are therefore not new but have precedent in the Revised Statutes mentioned applicable to other Indians, the last one mentioned putting into effect

a criminal code as is in effect in other Indian reservations with the exception of the sections noted.

As to the rest of the new provisions, they are for the most part for the purpose of making of the Commission created by the bill, a body capable of finding facts upon which future action can be taken whether by Congress or by the Secretary of the Interior.

. . . [Here follows a lengthy discussion of a brief Wilson had received on an unrelated issue.] . . .

Sincerely yours,

/s/ Francis F. Wilson

APPENDIX E

Santa Fe, N.M.
February 27, 1926
c/o Pueblo Lands Board

United States as guardian of the Pueblo of Jemez, v. Santa Fe Northwestern Ry. Co.

The Attorney General,

Washington, D.C.

Sir:

This is one of the suits to quiet title following the report of the Pueblo Lands Board. It is at issue and could be tried at any time when a Federal Judge is available. There has recently occurred a new development, however.

This railroad was started as a private logging railroad, but has more or less developed until it is now about 40 miles long and has been recognized as a common carrier by the Interstate Commerce Commission. A further extension of 20 miles is being arranged, and it is locally hoped and expected that still further extensions will be made and that the road will be a valuable agency in developing the state.

Its right-of-way crosses not only Jemez but three other Pueblos, and was obtained in each case under the 1899 Act: U.S. Compiled Statutes, Section 4181, et. seq. The Pueblo Lands Board concluded that this Act was not broad enough to cover lands owned in fee by the Pueblo Indians and reported that the title to the land occupied by the Railway remained unextinguished in the Indians, subject to the easement of right-of-way, if any valid easement had been actually acquired. I agreed with the Board in

believing that the Act of 1899 did not cover in this case. For this reason, and under the express requirements of the Pueblo Lands Act, a suit to quiet title became inevitable. You will find a discussion, both of the facts and law, in my letters of November 4th and November 27, 1925, to you.

It now transpires that at the time the suit was filed, viz: about January 8, 1926, the White Pine Lumber Company, which is practically identical with the Railway Company, was negotiating a loan of over a million dollars to be secured by a bond issue covering properties, as I understand it, both of the Lumber Company and of the Railway Company, the proceeds to be used for further development work. The suit evidently came as a great surprise to the Railway Company, which had apparently not studied the Act of 1899 carefully and which, having fully complied with all the requirements of the Department of the Interior, believed its title to be sound. The bond houses in Chicago, which were preparing to underwrite the bond issue, immediately took cognizance of the situation, and after some correspondence a conference was had here yesterday, at their request. There were present, Governor H. J. Hagerman, who represents the Secretary of the Interior on the Pueblo Lands Board; Mr. Cochrane, Special Attorney for the Pueblo Indians; Judge Hanna, of Albuquerque, who is attorney for some of the Indian Aid societies and, as well, for local companies desirous of obtaining rights of way for power lines across some of the Pueblos; Mr. Porter, Vice-President of the Railway Company; Judge Hawley, of Chicago, representing the bond houses; and myself. The results of a lengthy discussion may be briefly summarized thus:

1. The Railway and Bond house representatives could not offer any plausible defense to the suit. In other words, while they would not admit that the Act of 1899 was inapplicable, it was quite clear that they felt such to be the case.

2. It was the general sense of all present that while the Pueblos should be protected in every way, their peculiar status ought not to put them in a more favored position than other Indians or than white men, so as to be able to prevent railways, telegraph and telephone and power lines, etc. from crossing their grants. It also seemed fairly clear that this Railway has been a benefit rather than a detriment to the Jemez pueblo, being of some value to the Indians for transportation, and affording employment to a number of them. As above stated, this enterprise is favorably regarded in New Mexico as an existing agency of development which promises to be increasingly valuable to the state.

3. It was therefore felt that the government should not interfere with the Railway or its projected loan further than duty absolutely required, and there was much discussion as to how the right-of-way could be legalized. One alternative is offered by Section 17 of the Pueblo Lands Act, reading:

> "Sec. 17. No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community,

> or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior."

This section presents one of the numerous puzzles offered by the Act. At first reading the two halves of the section seem contradictory; the first saying that no title to the Pueblo Lands shall be acquired except under subsequent legislation by Congress, and the second half saying, in effect, that conveyance by Pueblos, or individuals thereof, may be valid if approved by the Secretary of the Interior. We concluded, however, that the two halves might be harmonized by construing the first to mean that no title could be adversely acquired except under subsequent acts of Congress, and the second to mean that the Pueblos might voluntarily convey, and that such conveyance would be good if approved by the Secretary. Like so many other feature [sic] of this Act, the foregoing construction cannot be considered certain, but seems reasonable.

Since the conference, defendant's representatives have announced a purpose of immediately approaching the Secretary of the Interior in an attempt to agree upon a form of deed acceptable to him, which they will then try to have executed by the Pueblo authorities, and returned to Washington for approval. If all this succeeds, the bonding houses will apparently be willing to make the proposed loan.

In any effort to procure a conveyance from the Pueblo, the Company will doubtless be met with a demand for additional compensation. I have heretofore expressed a doubt whether the damages already paid are adequate, and if the general scheme is approved, the question of in-

creased compensation will be looked into by the Special Attorney for the Pueblo Indians. You will note that Section 17 does not expressly say that Pueblo conveyances shall hereafter be valid if approved by the Secretary, but merely that they shall *not* be valid unless so approved. Theoretically, and in fact, the Pueblo Indians are incompetent to manage their own affairs, and I think it unfortunate if the Pueblo corporations — and still more the individual Indians — are now authorized to convey, even subject to an approval, which must usually be based on the recommendation of some local official who may or may not be fully informed and disinterested. However, in the present instance the railway is already constructed and cannot well be got rid of; it has paid a considerable sum (nearly $3,000 to Jemez Pueblo) as damages; it appears to be a public benefit; and if it deems this method of curing its title sufficient, and can bring it about, I think the general good would be served by acquiescing rather than by urging the doubts suggested by Sec. 17.

4. In the long run, I believe that the only certain way of rectifying the general situation is by Act of Congress. It is fair that the Pueblos should be subject to the acquisition of rights of way for public utilities of all sorts, just as other Indians are, on payment of just compensation. It was suggested at the conference that it would not be difficult to frame an Act making the provisions of U.S. Compiled Statutes, Section 4181, et. seq., applicable to the Pueblos; but defendant has apparently decided to try the other course first.

5. One result of all the foregoing is that the Railway Company would like the suit to lie dormant until they can make an attempt to validate their title by one or the

other of the above methods. If either should succeed, the controversy would become moot and the suit could be dismissed. They are naturally reluctant to run the risk of a judgment declaring in effect that they are trespassers, and call attention to their good faith and to the prima facie validity of the permit of the Secretary under which they acted. They also promise immediate action in the way above indicated, and obviously they cannot hope otherwise to obtain their loan.

I therefore ask authority to suspend proceedings in this suit for a reasonable time, until we see what they can accomplish.

I understand that Governor Hagerman and Mr. Cochrane agree with my views as to the desirability of assisting rather than thwarting the railway project, and that the former will so report to the Department of the Interior.

Respectfully,

/s/ GEO. A. H. FRASER
Special Assistant to
the Attorney General

APPENDIX F

February 27, 1926

The Honorable Secretary of Interior,
Washington, D. C.

Sir:

The Albuquerque Gas and Electric Company of Albuquerque, New Mexico, has planned a large power plant at Bernalillo and expects to construct a forty-four thousand volt transmission line from that point to Albuquerque. The proposed line will run over the land of the Sandia Pueblo. Under the act creating the Pueblo Lands Board (Section 17) such a lease or grant must be approved by the Secretary of the Interior, and assuming that the Company will be able to obtain the permission of the Indians and a deed or a right of way grant is given the Company by the Indians, their action will be subject to your approval.

So far as the Indians are concerned the proposed right of way runs through bosque lands for the most part not in cultivation, and it cannot in any manner, that I can see, injure the Indians or impair the value of their property. In view of this fact and the further fact that the project will be very beneficial to Albuquerque and the territory between that City and Bernalillo, I desire to express my hope that you will approve any action that the Indians may take in the premises.

Very respectfully,

/s/ Francis C. Wilson

W:W

No. 84-262

In the Supreme Court of the United States

October Term, 1984

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

v.

PUEBLO OF SANTA ANA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PROOF OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States and Counsel of Record for Public Service Company of New Mexico, *amicus curiae* herein, hereby certifies that on November 21, 1984, pursuant to Rule 33 of the Rules for the United States Supreme Court, service of the Motion for Leave to File Brief *Amicus*

Curiae and Brief of *Amicus Curiae* Public Service Company of New Mexico in Support of the Position of the Petitioner was made upon:

Kathryn Marie Krause, Esq.
931 14th Street, Suite 1300
Denver, Colorado 80202
Counsel of Record for Petitioner

and

Richard W. Hughes, Esq.
Scott E. Borg, Esq.
201 Broadway, S.E.
Albuquerque, New Mexico 87103
Counsel of Record for Respondent

by depositing three correct copies of same in the United States mail, with first class postage prepaid, properly addressed as listed above.

All parties required to be served have been served.

DATED: November 21, 1984.

ROBERT H. CLARK
Counsel of Record

CLYDE F. WORTHEN
PAULA Z. HANSON
KELEHER & MCLEOD, P.A.
P.O. Drawer AA
Albuquerque, New Mexico 87103
(505) 842-6262

Counsel for *Amicus Curiae*,
Public Service Company of
New Mexico